Filed 7/31/02 P. v. Navarro CA2/4

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ALBERT NAVARRO, Defendant and Appellant.	B149608 (Super. Ct. No. BA206770)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alice E. Altoon, Judge. Affirmed.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, David C. Cook and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Albert Navarro appeals from the judgment entered following a jury trial that resulted in his conviction of robbery during which a principal was armed with a firearm (Pen. Code, §§ 211, 12022, subd. (a)(1); count 1);[1] assault with a firearm (§ 245, subd. (a)(2); count 2); and assault by means likely to produce great bodily injury (GBI) (§ 245, subd. (a)(1); count 3), and court findings that appellant had suffered a prior serious felony conviction (§ 667, subd. (a)(1)), which also qualified as a strike under the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). He was sentenced to prison for the total term of 18 years.

Appellant contends the trial court erred in instructing the jury regarding reasonable doubt and on jury nullification (CALJIC No.17.4.1). He contends the court also committed prejudicial errors in admitting: (1) evidence of his gang membership; (2) lay testimony describing the perpetrators as gang members; and (3) testimony raising innuendos that appellant had intimidated witnesses in this case and if released, he would harm the victim. He further contends the court erred in excluding: (1) evidence that the victim shot appellant prior to trial; and (2) evidence regarding appellant's condition at the time he gave a false name upon his arrest.

Appellant also contends that because the court excluded evidence that appellant had beaten his wife, the prosecutor committed misconduct by highlighting such evidence during summation.[2] He contends his attorney was ineffective based on the latter's failure to object to: (1) evidence the victim was afraid of appellant and fellow gang members; (2) evidence Big Hazard gang

---

[1] All further section references are to the Penal Code unless otherwise indicated.

[2] In his reply brief, appellant acknowledges that in his opening brief, he mistakenly attributed to the prosecutor certain questions drawn from the reporter's transcript at pages 228-229, which were in fact asked by his own trial counsel. He therefore abandons his misconduct claim based on such questioning.

members typically sought violent revenge against those who testified against fellow gang members; and (3) testimony regarding the investigation of two nonappearing witnesses. Finally, he urges that reversal of the judgment is compelled, in any event, based on the cumulative prejudice from these errors.

Based on our review of the record and applicable law, we affirm the judgment.

FACTUAL SUMMARY

We view the evidence in the light most favorable to the People and presume the existence of every fact the trier could reasonably deduce from the evidence that supports the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The following summary is based on this appellate standard of review.

Sometime in December 1999, Jose Cervantes, who had observed appellant's nephew beat up Cervantes's son, spoke to the police. He was subsequently scheduled to testify at the trial. Appellant was a member of the "Big Hazard" gang and his moniker was "Stranger." His nephew was also a gang member.

On January 9, 2000, around 1:00 p.m., appellant approached Cervantes near his residence. He told Cervantes that if he testified, appellant would "find" him and he would have a "hard time," which Cervantes believed meant appellant would kill him. Appellant also stated, however, that all was forgiven regarding Leticia, his "common law wife." Leticia Magana and Cervantes had engaged in an affair beginning around May 15, 1999, and Cervantes resided with her until around July or August 1999. He moved out, because Leticia was being moved to Long Beach in anticipation of appellant's release from jail.

Afterwards, Cervantes noticed six or seven other gang members in a nearby garage. He subsequently filed a police report concerning appellant's threat. On

March 16, 2000, appellant was sentenced to a jail term based on his conviction for intimidation of a witness (§ 136.1, subd. (c)(1)) in case number BA197739.

On August 24, 2000, sometime between 10:00 a.m. and noon, Jose Cervantes took his car to the Ramona Gardens, a housing project in Los Angeles, to be repaired by "Jaime." Cervantes was conversing with Jaime's father in the parking lot when a car driven by Leticia passed by. Cervantes believed the passenger, appellant, looked at him.

Around 15 minutes later, three gunmen walked towards Cervantes, who thought they looked like "chollos," or gang members. About three feet away, the three pointed their cocked guns at Cervantes. Appellant, who along with a fourth man, also approached but remained 20 to 30 feet behind. One of the gunmen pointed a finger at Cervantes and said to appellant, "This is the one." Appellant agreed. Striking Cervantes in an eye with his gun, the same man said, "This is for ratting on my home boy[.]" Afterwards, the gunmen struck him with guns and fists. Cervantes could not see out of his injured eye. His head was fractured and bleeding.

When Cervantes attempted to leave, appellant approached and began hitting him with closed fists and kicking his head, shoulders, lower back, and legs. The others ceased their attack and just stood there. After appellant moved away, one of the gunmen approached and demanded Cervantes's wallet. Cervantes denied having any money. At the other's demand, he handed over his cellular phone. Appellant was about 30 to 40 feet away watching.

In the beginning of September 2000, Cervantes went to Mexico. He returned about 15 to 20 days later. He planned to leave town again after the trial, because he was afraid of what would happen if appellant were released.

On September 24, 2000, appellant was arrested while at the "Los Angeles County-USC Medical Center" emergency room. He falsely identified himself as "Alex Calderon."

Appellant did not present any affirmative defense.

DISCUSSION

1. *Jury Properly Instructed on Reasonable Doubt as to Count 2*

Appellant contends the trial court erred in instructing the jury regarding reasonable doubt. The record does not support his contention.

The jury was instructed on reasonable doubt pursuant to the standard CALJIC No. 2.90 instruction. This instruction is a correct statement of the law. (See, e.g., *People v. Osband* (1996) 13 Cal.4th 622, 678; *People v. Davis* (1995) 10 Cal.4th 463, 520-521.)

During deliberations, the jury foreperson indicated to the court and in the presence of counsel and defendant that it was the foreperson's belief the jury might not be able to render a decision on count 2. The foreperson gave a negative response when the court asked if more time to consider the evidence and instructions would enable the jury to reach a decision. He added, however, that the other jurors might think differently. When the foreperson indicated additional evidence might be helpful, the court responded the jury already had all the evidence.

When polled by the court, almost all the jurors opined that further deliberation probably would not lead to a verdict. Juror number 5, however, thought "maybe a little elucidation about the reasonable doubt instruction might help."

Addressing the jury, the court announced: "[T]here are a few of you that are sort of on the fence, and the only thing that I can say regarding the reasonable doubt instruction is that it, basically, is telling you to evaluate the evidence in light of the instructions on the law, and I am going to read it again." The court then reread CALJC No. 2.90 regarding the definition of reasonable doubt.

When asked by juror number 9 if the trial court could explain "reasonable doubt as it pertains to count 2," the court responded: "Well the only thing I can tell you is that you have to look at the evidence that was presented as to each count. The way you look at counts 1 and 2 and the evidence that was presented as to those counts, you have to see if the evidence as to count 3, the interpretation that you placed on what happened, what you believe happened, what you believe the witnesses testified to is or is not the circumstances. And based on what you believe regarding the evidence, looking at it in terms of your common experience, common knowledge, common sense, is it reasonable that this is what occurred or that is what occurred, of if you do not feel that you have enough information to make a reasonable determination, and that is what you have to decide. As you did with the other two counts[, i.e., 1, 3], that's what you have to do on this count[, i.e., 2]."

Juror number 12 then stated "more time would be helpful." The court subsequently directed the jury to resume deliberations. Around an hour later, the jury returned a guilty verdict on count 2.

The record does not support an inference that the jury's initial inability to reach a verdict on count 2 arose from any doubts they entertained about the People's case. The jury had already reached verdicts on counts 1 (robbery where principal armed with firearm) and 3 (assault by means likely to produce GBI). It thus appears that the jury's indecision as to the remaining count, instead, arose

from confusion regarding the propriety of a guilty verdict on the count 2 charge of assault with a firearm where appellant was not armed with a firearm.

Additionally, contrary to his claim, the trial court's response to a juror's request for an explanation of "reasonable doubt as it pertains to count 2" did not operate to lessen or dilute the People's burden to prove guilt beyond a reasonable doubt. The jury had been directed by other instructions to decide guilt or innocence by determining the actual facts of the case based on the evidence presented.

When viewed in context with CALJIC No. 2.90 and these other instructions, the jury was directed in essence thereby to reach a not guilty verdict if they did not believe the People's version of what happened; a guilty verdict if they believed the People had proved their version beyond a reasonable doubt; and no verdict if they believed they did not have "enough information to make a reasonable determination" one way or the other. Nothing in the court's explanation could be construed to alleviate the People's burden, as stated in CALJIC No. 2.90, which already had been read twice in full to the jury, to prove appellant's guilt beyond a reasonable doubt.

2. *Giving of CALJIC No. 17.41.1 Harmless*

Appellant also contends the giving of CALJIC NO. 17.4.1 abridged his constitutional right to a unanimous jury trial (U.S. Const., 6th, 14th Amends.) We find the giving of CALJIC No. 17.41.1 to be harmless.

In *People v. Engelman* (July 18, 2002, S086462) ___ Cal.4th ___, ___, [Daily Journal D.A.R. 8034] our Supreme Court held that CALJIC No. 17.41.1, on its face, was not constitutionally infirm. It directed, however, that this instruction not be given in future trials for the reason that it "creates a risk to the proper

functioning of jury deliberations and that it is unnecessary and inadvisable to incur this risk." (*Id*. at p. 8037.)

Engelman was concerned that CALJIC No. 17.41.1 presented potential problems. One was the "risk that the instruction will be misunderstood or that it will be used by one juror as a tool for browbeating other jurors." (*People v. Engelman, supra,* ___ Cal.4th [Daily Journal D.A.R.] at p. 8036.) In other words, "[a] juror could . . . , without ever actually communicating with the court, place undue pressure on another juror by threatening to accuse that juror in open court of reasoning improperly or of not following the court's instructions in his or her decisionmaking process." (*Ibid*.)

Moreover, the vagueness of the instruction "could cause jurors to become hypervigilant during deliberations about *perceived* refusals to deliberate or other ill-defined 'improprieties' in deliberations[, which] could chill the free exchange of ideas that lies in the center of the deliberative process." Thus, there is the risk that a juror "might rely on CALJIC No. 17.41.1 as a license to scrutinize other jurors for some ill-defined misconduct rather than to remain receptive to the views of others." (*Engelman, supra,* ___ Cal.4th [Daily Journal D.A.R.] at pp. 8036-8037, italics in original.)

Additionally, "CALJIC No. 17.41.1 not only has the potential to lead members of a jury to shed the secrecy of deliberations, but also to draw the court unnecessarily into delicate and potentially coercive exploration of the subject matter of deliberations." *Engelman, supra,* ___ Cal.4th [Daily Journal D.A.R.] at p. 8037.)

Based on our review of the record, we conclude that CALJIC No. 17.41.1, as applied, did not give rise to the potential problems identified in *Engelman*. There was no indication the jurors misunderstood the instruction or that any juror was

harassed or intimidated by another or others. There was no undue intrusion upon the secrecy of or any adverse impact on the course of deliberations.

The record here reflects the jury did not communicate with the court during deliberations at all about whether one or more jurors failed or refused to deliberate or was subject to harassment or intimidation. Accordingly, the giving of CALJIC No. 17.41.1 in this instance was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

3. *Gang Evidence Properly Admitted to Show Motive*

Appellant contends the court committed prejudicial error in admitting evidence of his gang membership and lay testimony describing the perpetrators as gang members. We find no error.

Prior to trial, the People sought a ruling allowing the introduction of gang evidence. Appellant objected on the ground such evidence was irrelevant and more prejudicial than probative. The court reserved its ruling pending research on various gang-related cases.

During direct examination, Cervantes testified that he believed his attackers were "chollos," meaning gang members, based on their short hair and baggy clothing. He also testified that chollos commit crimes, i.e., "[t]hey go around beating people, mistreating them, scratching things." With regard to appellant's earlier threat, he testified that he believed the six or seven persons inside the garage were gang members because of their hairstyle and their baggy clothing.

Shortly afterwards, the court asked whether appellant's attorney had any objection to proffered gang expert testimony. He first responded that "at this point I would withdraw any objection [until I hear] what the gang expert has to say[.]" He then objected to any line of inquiry as to whether Cervantes still feared Big

Hazard gang members. The court allowed a brief inquiry as to Cervantes's current fear of gang retaliation without getting into details.

When Officer Casini, began testifying about Big Hazard gang graffiti on the walls of the Ramona Gardens housing project, appellant's attorney objected on relevancy and prejudice grounds. He stated, "There's no opposition to the fact that [appellant] is a gang member, and there is no opposition to the fact that [Cervantes] testified that he thought [his attackers] were gang members, so [the purpose of the challenged testimony is] just to prejudice the jury with more and more gang information when it is not an issue in the case."

In response to the court's inquiry, the prosecutor admitted she was laying a foundation through this testimony to establish the attackers belonged to the same gang as appellant. Appellant's attorney protested that "[t]hat's already been testified to and not objected to, and there's not going to be any evidence, and this is strictly done to prejudice [appellant] by continually bringing in inflammatory evidence about gangs when there's no defense that [appellant] is not a gang member, and there was no defense that this is not perpetrated by gang members."

The court overruled the objections and allowed the testimony regarding Big Hazard graffiti on the walls of the project.

"[A]dmission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged. . . . Moreover, even where gang membership is relevant, because it may have a highly inflammatory impact on the jury trial courts should carefully scrutinize such evidence before admitting it." (*People v. Williams* (1997) 16 Cal.4th 153, 193, citations omitted.) Nonetheless, "in a gang-related case, gang evidence is admissible if relevant to motive or identity, so long as its probative value is not outweighed by its prejudicial effect." (*Ibid*., citation omitted.)

Contrary to appellant's claim, the challenged evidence was more probative than prejudicial. A principal issue was the motive for the attack on Cervantes. The People were entitled to demonstrate the nexus between appellant and the attackers. The gang testimony was highly probative on this issue while the prejudice to appellant was relatively minor in view of the unchallenged evidence of the gang membership of appellant and his nephew.

A major motive for the attack clearly was gang-related revenge. Appellant, a Big Hazard gang member whose moniker was Stranger, was required to serve jail time, because Cervantes told police about appellant's threat if he testified against the latter's nephew, who was also a gang member.

The unprovoked attack on appellant took place at the Ramona Gardens housing project, a Big Hazard gang hangout. The People were entitled to show this was not simply a random attack but one instigated by appellant in retaliation for Cervantes turning him in and carried out at his direction by fellow members who resided or frequented the project.

The challenged testimony thus served to explain the gang-related nature of the attack. "Chollo" is Spanish slang for gang member, someone who wore baggy clothing. Appellant was an admitted member of the Big Hazard gang. Big Hazard was known for committing such crimes as theft, attacks with a deadly weapon, drive-by shootings, and homicide. "The whole gang mentality" referred to the rush gang members got from thriving on "intimidation and danger and committing crimes and letting people know that they are in charge of that area."

Someone labeled a rat, meaning a person who cooperated in the police investigation of a gang member, was marked for death, and a "shot caller," i.e., hard core member, could direct junior gang members to hurt or kill the "rat." The shot caller might be present to monitor the execution of his orders. Appellant was a "shot caller."

The Big Hazard gang claimed as their territory the Ramona Gardens housing project and adjacent area. It was the only gang in the project. Big Hazard gang graffiti were on the inside walls. About 144 of the gang's active members and "associates," members who deny their membership, resided in the project.

In view of the foregoing, the jury was entitled to find when appellant noticed Cervantes in the Ramona Gardens housing project, which was Big Hazard territory, he took the opportunity to retaliate against Cervantes for "ratting" on him; the attackers were fellow Big Hazard gang members; and the attackers carried out appellant's orders in attacking appellant. The trial court therefore did not err in finding the challenged testimony was probative to explain the unprovoked attack on Cervantes in the project; the reason behind the attack; and the identity of his attackers.

Additionally, the absence of a timely appropriate objection precludes appellate review of his claim that Cervantes's lay opinion about the gang affiliation of his attackers was incompetent, and thus, inadmissible. (See, e.g. *People v. Saunders* (1993) 5 Cal.4th 580, 589-590; cf. *People v. Vera* (1997) 15 Cal.4th 269, 276-277.)

Moreover, any potential for prejudice flowing from admission of such evidence was dissipated by the court's express admonition that the jury was not to consider appellant's gang membership as evidence of a bad character or disposition to commit crimes. Rather, they could only consider such evidence on the issue of "[a] motive for the commission of the crime charged" and whether appellant "had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged." Also, the jury was "not permitted to consider such evidence for any other purpose." (CALJIC No. 2.50.) The jury is presumed to have adhered to this admonition. (See, e.g., *People v. Pinholster* (1992) 1 Cal.4th 865, 919; *People v. Adcox* (1988) 47 Cal.3d 207, 253.)

4. *No Improper Innuendos Arising from Admitted Evidence*

Appellant contends that the court erred by admitting testimony which raised improper innuendos that if released, appellant would harm the victim and that appellant had intimidated witnesses in this case. We disagree.

The prosecutor elicited testimony from Cervantes that he continued to fear appellant. When asked why he switched cars, Cervantes responded, "For fear that they're going to see me, that they're going to beat me." In response to two follow-up inquiries, he explained that he meant "[t]he gang members," specifically appellant. Cervantes further testified that he left town following the attack; he changed residences after being subpoenaed to testify in this case; and he intended to leave after testifying from fear that appellant would do "the same thing" when he was released from incarceration.

Subsequently, over appellant's objection, the prosecutor elicited testimony from Cervantes that after his car had been towed to his home following the attack, he discovered its windows and light had been smashed.

Without objection, the prosecutor presented evidence from Officer Barboza, a gang expert, to establish that if the gang labeled someone a rat, i.e., someone who cooperated with the police, that person would be marked for death. The gang member himself or, at his direction, other gang members would then "give that person a severe beating or even kill that witness so he won't show up in court."

Also without objection, the prosecutor elicited evidence from Barboza about two nonappearing witnesses. He testified that Mario (Diaz) Ramirez, who was "another witness [who] supposedly witnessed something in this case" and resided in Ramona Gardens, was "very uncooperative." After Barboza testified Cervantes's girlfriend, Rose Marie Semental, was cooperative and had been served with a subpoena, the prosecutor asked if he knew why she was not in court. The

court sustained appellant's objection. Barboza then testified, without objection, that Semental resided half a block from Ramona Gardens.

Initially, we point out that appellant, by his failure timely to object, is foreclosed from complaining about: (1) Cervantes' testimony that he continued to fear appellant and what he might do when released from incarceration; (2) the gang-related testimony on what happened to someone labeled a "rat" by the gang; and (3) Barboza's testimony regarding Ramirez and Semental. (See, e.g., *People v. Saunders, supra*, 5 Cal.4th at pp. 589-590.)

We conclude the evidence regarding the damage to Cervantes's car was properly admitted as a circumstance tending to show that the attack on Cervantes was personally motivated, rather than a random robbery.

We further conclude that no prejudice flowed from the inquiry as to why Semental was not in court, because the jury was instructed to disregard any questions to which an objection was sustained and not to speculate on the reason for the objection or what the response might have been. (CALJIC No. 1.02.)

5. *Pretrial Shooting of Appellant by Victim Properly Excluded*

In a pretrial motion, the People sought to exclude any reference to the allegation that one month after the subject crimes, Cervantes shot appellant. The prosecutor argued the evidence was irrelevant, because the supposed shooting was still being investigated and no arrest had yet been made.

Appellant contends exclusion of evidence that the victim shot appellant prior to trial violated his right to confront and cross-examine witnesses. (U.S. Const., 6th Amend.)

Appellant's attorney argued that if evidence of the relationship between appellant and Cervantes before the charged crimes was relevant, then evidence of such relationship after the crimes was also relevant. He acknowledged, however,

that the claimed shooting was not relevant to the charged crimes. His offer of proof was that appellant would testify that on August 24, 2000, appellant beat up Cervantes in a fist fight and that, afterwards, Cervantes threatened to shoot him or send him to jail. He would further testify that after he saw Cervantes with a gun, Cervantes shot him in the buttocks as he ran away.

After taking the matter under submission, the court granted the exclusion motion on the ground the alleged shooting was not relevant to the charged crimes. We further find such evidence was properly excluded on the ground of lack of relevancy.

Initially, we find appellant has forfeited his claim that exclusion of the assigned evidence violated his right to confront and cross-examine witnesses by his failure to object on that ground below. (See, e.g., *People v. Saunders*, *supra*, 5 Cal.4th at pp. 589-590; see also, *People v. Alcala* (1992) 4 Cal.4th 742, 805-806 [waiver where defendant fails to assert timely and adequate demand to testify]; *People v. Buford* (1974) 42 Cal.App.3d 975, 982 [waiver where failure timely to object on ground of abridgment of right to confront and cross-examine witness in face of advisement of such right twice by the court prior to testimony].)

"The trial court is vested with wide discretion in determining the relevance of evidence." (*People v. Babbitt* (1988) 45 Cal.3d 660, 681.) Trial courts "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, . . . confusions of the issues, . . . or interrogation that is . . . only marginally relevant." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.) Thus, "[e]xclusion of impeaching evidence on collateral matters which has only slight probative value on the issue of veracity does not infringe on the defendant's [guarantee to] confrontation. . . ." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 350, citation omitted.)

As appellant's attorney conceded, the supposed shooting was not relevant to the subject crimes, the commission of which by appellant was the issue to be determined by the jury.

6. *Exclusion of Appellant's Condition When Giving False Name Proper*

Appellant contends his rights to confront witnesses and present evidence (U.S. Const., 6th, 14th Amends.) was abridged by excluding evidence of his condition at the time he gave a false name upon his arrest. We find neither error nor constitutional infirmity.

Los Angeles police officer Newlin Driller testified that on September 24, 2000, when he made contact with appellant, the latter identified himself as "Alex Calderon." Driller, however, believed he might be the suspect depicted in a "Wanted" poster. Upon retrieval of the poster, he confirmed appellant was really the "Albert Navarro" depicted thereon.

The prosecutor objected to the inquiry about where Driller encountered appellant on the ground appellant's attorney was trying to elicit evidence about the victim shooting appellant a month after the charged crimes. The court allowed appellant's attorney to ask Driller where he was when he stopped appellant and nothing more. Driller responded that appellant was in the "LA County-USC Medical Center" emergency room. When appellant's attorney asked no other questions and made no further objections, Driller was excused.

Appellant has forfeited his claim on the grounds that exclusion of evidence of his condition when he gave a false name violated his constitutional rights to confrontation and a fair trial. (See, e.g., *People v. Saunders*, *supra,* 5 Cal.4th at pp. 589-590; see also, *People v. Alcala, supra,* 47 Cal.3d at pp. 805-806; *People v.*

Buford, supra, 42 Cal.App.3d at p. 982; cf. *People v. Vera, supra,* 15 Cal.4th at pp. 276-277.)

His position is unsupported by the record. As demonstrated *ante*, the trial court properly excluded evidence that Cervantes had shot appellant about a month after the subject crimes were committed. Also, appellant's attorney denied he was trying indirectly to place such evidence before the jury through his questioning of Driller.

The court in fact granted his request that the jury be informed where appellant was when he gave a false name to police. Appellant's attorney acquiesced in such ruling without objection or further argument. Appellant therefore is in no position to complain about the court's ruling in this regard. Moreover, contrary to his claim, he was not "impeded in his attempt to show that his ability to understand and respond to Officer Driller was impaired by pain or the medical treatment he was receiving." At no time did appellant's attorney make any offer of proof or even request such a line of inquiry. Appellant therefore waived any right he might have had to inquire about his mental condition when questioned by Driller at the emergency room.

7. *No Prosecutorial Misconduct Shown*

Appellant contends that because the court excluded evidence that appellant had beaten his wife, the prosecutor committed misconduct by highlighting such evidence during summation.

During closing argument, appellant's attorney argued that the case was really about appellant by himself beating up Cervantes to keep him away from Leticia, not about gang vengeance. The prosecutor responded that the defense was not credible in part, because Leticia did not testify at trial. After sustaining appellant's objection, the court admonished the jury that the defense was not

obligated to call any witnesses and that although both sides had subpoenaed Leticia, neither had chosen to call her as a witness.

The prosecutor next argued that another motive in this case was appellant's desire to pay back Cervantes for sleeping with appellant's wife. He reminded the jury that Cervantes testified that in November 1999, appellant was released, and "Leticia was being moved because he [had] beat her" and that Cervantes first met Leticia in May 1999, while appellant was still in custody.

She then argued: "Defense says that [appellant] has been disrespected because [Cervantes] is sleeping with his wife. So what else is the motive? [Appellant]'s wife. And I put wife in quotation marks here because [they are not married but have children together]. Maybe he thinks of her as a chattel. I don't know. But, look, the victim is dating [appellant]'s wife while [appellant] is in custody for spousal abuse. . . . Then there's this supposed forgiveness in January of 2000. And after [appellant] says he forgives his wife, what does she do? She continues to . . . date [Cervantes] until [appellant,] once again, is released in May of 2000. Now's he's angry. And he's already been in custody for beating his wife, so who is he going to go after for that rage? The victim, [Cervantes]."

"As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. . . ." (*People* v. *Samayoa* (1997) 15 Cal.4th 795, 841, citation omitted.)

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" (*People* v. *Gionis* (1995) 9 Cal.4th 1196, 1214 . . . ;

People v. *Espinoza* (1992) 3 Cal.4th 806, 820 . . . .) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. "'" (*People* v. *Espinoza, supra,* 3 Cal.4th at p. 820.)' (*People* v. *Samayoa[, supra,]* 15 Cal.4th 795, 841 . . . .)" *People v. Hill* (1998) 17 Cal.4th 800, 819.)

Initially, we point out that appellant did not assign as prosecutorial misconduct any of the above quoted comments made by the prosecutor or request any admonition. He therefore has forfeited any misconduct claim in this regard.

We conclude that, in any event, the challenged comments do not amount to misconduct. The record reveals that it was appellant's attorney who elicited Cervantes's testimony that the authorities felt it was necessary to conceal Leticia from appellant when the latter was released from jail. Based on this testimony, the jury was entitled to infer that appellant had beaten Leticia before and might again following his release. When viewed in this context, it is clear that the prosecutor's remarks were simply fair comment upon the evidence and attendant inferences and proper rebuttal to the defense that appellant was merely trying to keep Cervantes away from Leticia.

8. *No Ineffective Assistance of Counsel Shown*

Appellant contends his attorney was ineffective based on the latter's failure to object to: (1) Cervantes's testimony that he believed his attackers were gang members; (2) evidence that the victim was afraid of appellant and other Big Hazard gang members; (3) evidence that such gang members typically sought violent revenge against those who testified against their fellow members; and (4) Barboza's testimony regarding the investigation of Ramirez and Semental. We find he has failed to carry his burden.

"To establish constitutionally ineffective assistance of counsel under either the state or federal constitutional right to counsel, appellant must demonstrate (1) that his attorneys' performance fell below an objective level of reasonableness, i.e., that counsel's performance was not within an objective level of reasonableness and thus did not meet the standard to be expected of a reasonably competent attorney, and (2) demonstrating that he suffered prejudice as a result of that failure. Prejudice is established if there is a reasonable probability that, absent counsel's errors, the result would have been different. (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 371; *Strickland v. Washington* [(1984)] 466 U.S. [668,] 687-688; *People v. Ochoa*[(1998)] 19 Cal.4th [353,] 414.)" (*People v. Coddington* (2000) 23 Cal.4th 529, 651-652.)

"Representation does not become deficient for failing to make meritless objections." (*People v. Ochoa* (1998) 19 Cal.4th 353, 463; see also, *People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091 ["[D]efense counsel is not required to make futile motions or to indulge in idle acts to appear competent."].) Moreover, "[c]laims that the case might have been handled more effectively or that the attorney's tactics were poor are insufficient to show ineffectiveness of counsel." (*People v. Colligan* (1979) 91 Cal.App.3d 846, 851.)

The record reflects the assigned omissions of appellant's attorney were the product of tactical choices, and thus, they do not reflect any ineffectiveness on her part.

Motive was a principal issue, and at stake was the credibility of the People's sole eyewitness who testified, the victim Cervantes. The People's primary theory of the case was the attack on Cervantes was carried out by junior gang members at the instigation of appellant, a gang "shot caller," for the purpose of gang retribution, i.e., revenge against Cervantes for telling the police about appellant's threat. Cervantes's belief his attackers were gang members; his fear of Big Hazard

gang members, particularly appellant; and in fact Big Hazard gang members typically sought violent revenge against those who "ratted" on fellow gang members were items of evidence which were highly probative of this issue. Accordingly, appellant's attorney was entitled to conclude that objection to the admission of such evidence would have been futile.

Similarly, appellant's counsel was not remiss in not objecting to Barboza's testimony that Ramirez, who resided in the gang-infested Ramona Gardens housing project, was "very uncooperative" in his investigation. Contrary to appellant's claim, such neutral testimony does not compel an inference that his lack of cooperation was the product of gang intimidation, specifically on the part of appellant. There was thus no occasion for an objection thereto by appellant's attorney.

As for Semental, appellant's attorney was not remiss in failing to object to Barboza's testimony. The court sustained the objection of appellant's attorney to the prosecutor's question to Barboza about why she did not appear. No objection was called for with regard to his testimony that Semental resided a half block from the project. As a tactical matter, appellant's attorney may have decided to allow the jury to infer that her testimony was not probative in that she did not reside near the crime scene, and thus, could not have observed what had happened to Cervantes and who the culprits were.

9. *No Prejudice Based on Cumulative Error Shown*

Appellant contends that, in any event, reversal of the judgment is compelled based on the cumulative prejudice from these errors. Having failed to establish any error, appellant cannot meet his burden to demonstrate any cumulative prejudice flowing therefrom. (See, e.g., *People v. Loewen* (1983) 35 Cal.3d 117, 129.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

CURRY, J.

We concur:

VOGEL (C.S.), P.J.

HASTINGS, J.